

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 15, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP2431**

**Cir. Ct. No. 2016SC736**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**NATHAN A. WILLARD,**

**PLAINTIFF-APPELLANT,**

**V.**

**K SMITH HOLDINGS,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Winnebago County:  
DANIEL J. BISSETT, Judge. *Affirmed.*

¶1 HAGEDORN, J.<sup>1</sup> Nathan A. Willard appeals from an order of the circuit court dismissing his negligence claim. He argues that the court applied the

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

wrong procedural rules and erred in concluding that Willard failed to prove his case. We disagree and affirm.

## **BACKGROUND**

¶2 The respondent, K Smith Holdings, Inc., owns a fitness center (Anytime Fitness) that Willard frequented. We will refer to the respondent and Anytime Fitness collectively as “Anytime Fitness” for ease of reading. In August 2014, Willard was injured while using an exercise machine at Anytime Fitness. Willard filed a small claims complaint alleging that he had suffered injuries to the tune of \$5000. The matter was heard before a court commissioner, who ruled against Willard. Willard then sought de novo review of that decision in the circuit court. The following testimony was adduced during the trial before the circuit court.

¶3 Representing himself, Willard explained his injury as follows:

I was using a lap pull-down kind of machine. It’s like a pulley system bar and I had about two hundred pounds on it. And I was going for the pull-down portion and the cable snapped and the bar came down and into my forehead causing my mouth to clamp shut tight, put a gash in my forehead. There was some bleeding. I chipped the front of my tooth off, had some bleeding in my mouth, and was taken by ambulance to the hospital for a CAT scan and they told me that I had suffered a concussion.

Willard also testified that he had been trained to properly use the pull-down machine when he first joined the gym.

¶4 After Willard had finished testifying, opposing counsel intimated that “if there aren’t documents, medical records, medical bills certified, or testimony from health care providers, I would have to ask that the Court dismiss the case at this point for lack of proof.” Willard acknowledged that he did not

present any documentation for his medical expenses but clarified that he was requesting compensation for “the pain that I endured unnecessarily at [Anytime Fitness’s] facility.” The court concluded that Willard had made a “prima facie case” that he was injured and “could be awarded some soft damages, pain and suffering,” assuming Willard could prove that Anytime Fitness was negligent. Thus, the court clarified that “if [Anytime Fitness is] moving to dismiss now, I would deny the motion to dismiss.”

¶5 The court then took testimony from the owner of Anytime Fitness. The owner testified that safety inspections were conducted on the pull down machine “on a monthly basis” and “we do a visual equipment inspection so we go through and we ensure that there’s no fraying or wearing on any of the cable[s].” The owner clarified that “we do replace cables pro-actively.” The owner testified that a “basic equipment inspection” was conducted sometime in July 2014, prior to the injury on August 29, 2014. Willard then cross-examined the owner about the effectiveness of Anytime Fitness’s inspection procedures.

Q: Could you tell me then: Have you ever had an issue where you have not seen the cables broken or busted; somebody has pointed that out to you?

A: You mean as far as a member pointing out something?

Q: Right.

A: Yes, that’s [what] happened.

Q: So maybe you missed something?

A: Possibly. We have, you know, I wouldn’t say that we’ve had every single one, you know, caught it but when we’ll usually see signs of wear then we pro-actively replace that cable.

On redirect, the owner testified that there was no observable fraying or wear on the cable in question. Without any evidence of wear, the owner averred that the

“normal inspection” would not “have been able to pick up on there being a problem.”

¶6 The club manager was the last to testify. She was present at Anytime Fitness on the day of the accident and had reviewed a video of the accident. The manager explained that, in her opinion, Willard had been improperly using the pull-down machine when the cable broke. The manager additionally testified that “[w]e have re-enacted [Willard’s use of the machine] through video using trainers and staff and found it impossible to use that weight properly with proper form at any level.” Willard offered brief rebuttal testimony that he had been using the machine “in the exact way” he had been taught by the staff of Anytime Fitness.

¶7 After the close of testimony, the circuit court concluded that Willard had failed to prove that Anytime Fitness was negligent:

[T]he burden is on the plaintiff to show by a preponderance of the evidence that the defendant fitness center did not use reasonable inspection and reasonable maintenance of its equipment and facilities. The testimony here from the owner of the facility was that they have a procedure where they do a monthly visual inspection of the cable to try to observe any types of cracking or tearing or fraying or any possible defects that might exist in the cable and if they observe that then they will proceed to fix it or replace the particular cable. There was an inspection of this cable of this machine and it was done in the month preceding and the month of and the month after. And before the incident, it doesn’t appear that the inspections revealed any defects or any areas of concern that the plaintiff had in regards to the cable.

The court emphasized the lack of evidence that these inspections were insufficient. It pointed out that “[t]here hasn’t been any testimony here regarding periodic changing of cables, that a manufacturer says every five years you need to change

the cable” and “[t]here hasn’t been any testimony that there needs to be a more rigorous daily inspection here.” In light of the dearth of evidence, the circuit court concluded that Willard had not met his burden to prove that Anytime Fitness and its employees were negligent. Accordingly, the court dismissed the case. Willard appeals this decision.

## DISCUSSION

¶8 Willard continues pro se on appeal and takes issue with several aspects of the circuit court’s decision. As a preliminary matter, he argues that the circuit court erred by applying “the common law and statutory rules of evidence” instead of the relaxed procedures outlined in WIS. STAT. § 799.209 applicable to small claims proceedings.<sup>2</sup> A review of the record reveals that the circuit court did in fact apply the relaxed evidentiary standards required by § 799.209.

¶9 Moving to the heart of this appeal, Willard’s main objection relates to the circuit court’s view of the evidence. He points out the testimony of the owner that there had been “previous instances of missed broken or malfunctioning machinery” that had been brought to the attention of the owner by patrons. He maintains that the fact Anytime Fitness’s inspection and maintenance procedures “missed” these instances illustrates that the inspection procedures were “not ... reliable.” Thus, he reasons, “[f]ailure on the part of [Anytime Fitness] to

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<sup>2</sup> Willard also implies that the circuit court was required “to request to see” video surveillance showing the accident. Willard provides no legal authority for this proposition and we need not address it. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

restructure its practices, and to insure the safety of its members, after broken equipment was not noticed by staff, constitutes negligence.”<sup>3</sup>

¶10 As a general rule, negligence is a question for the fact finder, not a question of law. *Casper v. American Int’l S. Ins. Co.*, 2011 WI 81, ¶92, 336 Wis. 2d 267, 800 N.W.2d 880. After a bench trial, the circuit court’s “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.” WIS. STAT. § 805.17(2). This means we must affirm the circuit court’s findings “as long as the evidence would permit a reasonable person to make the same finding.” *Heuser ex rel. Jacobs v. Community Ins. Corp.*, 2009 WI App 151, ¶11, 321 Wis. 2d 729, 774 N.W.2d 653.

¶11 Willard makes a valiant attempt to demonstrate that the circuit court’s finding of no negligence was clearly erroneous, but—in light of our deferential standard of review—his arguments do not win the day. It is true that the owner testified that it was possible that the inspections “missed something,” but the owner also testified that the particular cable at issue showed no signs of wear and therefore any defect was undetectable by visual inspection. As the circuit court noted, Anytime Fitness conducted one of its monthly inspections prior to the accident. Aside from his pointed cross-examination of the owner, Willard provided no evidence showing that Anytime Fitness’s inspection

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<sup>3</sup> Willard argues that the court erred “in ruling as a matter of law” that Anytime Fitness did not breach its duty of care towards Willard because a “rational fact finding could find” that Anytime Fitness was negligent and “[t]he allegations in plaintiff[s] pleading are sufficient to state a common law negligence claim.” This is not what happened. The court did not dismiss Willard’s case as a matter of law. It conducted a trial and denied Willard’s claim based on his failure to prove that Anytime Fitness’s conduct fell below the standard of care.

procedures were lacking. He provided no evidence that Anytime Fitness should have known that the cable was defective or should have been replaced sooner. Nor did he provide any evidence concerning how long the cable was expected to last. Accordingly, the court found that Willard had not proved that these procedures were negligent, and that finding is a reasonable one sufficiently supported by the evidence.

¶12 Willard's accident was unfortunate. But the law required him to convince the court that Anytime Fitness was negligent and that this negligence caused his injuries. He did not succeed in this and has not presented any legal authority for us to disturb the court's determination. Therefore, we must affirm.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

